PP

v.

BAHAR ABU

HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPEAL NO: 41-95-2006]
27 APRIL 2007

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Accused released on bond of good behaviour pursuant to s. 294 CPC upon conviction under s. 411 Penal Code - Whether learned magistrate erred in applying s. 294 CPC - Whether s. 294 CPC applicable where imprisonment mandatory*

The accused was charged with theft under s. 379A of the Penal Code ('PC') and alternatively with dishonestly receiving or retaining stolen property under s. 411 of the Penal Code ('PC'). The accused pleaded guilty to the alternative charge under s. 411 PC and the learned magistrate convicted and released the accused on a bond of good behaviour pursuant to s. 294 of the Criminal Procedure Code ('CPC'). The public prosecutor appealed against the adequacy of the sentence imposed by the learned magistrate.

Held (dismissing the appeal):

(1) Under s. 411 PC, a court may impose either imprisonment or fine or both. But if the stolen property is a motor vehicle or component part (as in the present case), then the term of imprisonment to be imposed is no less than six months and not more than five years and additionally a fine. Section 294 CPC envisages that where a court is by law empowered to impose the punishment of imprisonment, it may, in its discretion provided one or more of the criteria set out in the section are met, direct that the accused be released on a bond rather than be imprisoned. Section 411 PC is such a section. It provides for imprisonment particularly in relation to motor vehicles as in the present case and specifically utilises the words "shall be punished with imprisonment". The authorities have established that the words "shall be punished with imprisonment" is mandatory in nature. However, notwithstanding

A the mandatory nature of the provision of imprisonment provided under s. 411 PC, it is open to the magistrate to deal with the offender under s. 294 CPC. This is established by the authorities and also in view of the express exclusionary sections in the PC where ss. 173A and 294 CPC are not to
B be used. It followed therefore that the learned magistrate did not fall into error when dealing with the accused under s. 294 CPC in respect of an offence under s. 411 PC. Although the learned magistrate did not appear to have fully considered the pre-requisites specified under s. 294 CPC, he had arrived at
C the correct decision. (paras 7, 8, 9, 10, 11, 20, 22 & 23)

Case(s) referred to:
Gabriel v. PP [1992] 1 MLJ 593 ***(refd)***
Nordin Yusmadi v. PP [1997] 4 CLJ 25 CA ***(refd)***
Philip Lau Chee Heng v. PP [1988] 1 CLJ 873; [1988] 2 CLJ (Rep) 144
D *HC* ***(refd)***
PP v. Leonard Glenn Francis [1989] 1 CLJ 972; [1989] 2 CLJ (Rep) 320 HC ***(refd)***
PP v. Lim Hong Chin [1994] 1 CLJ 79 HC ***(refd)***
PP v. Idris [1955] 21 MLJ 234 ***(refd)***
E *PP v. Man Ismail [1939] 8 MLJ (FMSR) 207* ***(refd)***
PP v. Mohamed Nor & Ors [1985] 2 MLJ 200 ***(refd)***
PP v. Mohd Tajuddin Ahmad [1997] 2 CLJ 913 HC ***(refd)***
PP v. Yeong Yin Choy [1976] 2 MLJ 267 ***(refd)***
Teh Ah Cheng v. PP [1976] 2 MLJ 186 ***(refd)***
Winston Rajah v. PP [1999] 1 CLJ 315 HC ***(refd)***
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Legislation referred to:
Criminal Procedure Code, ss. 173A, 294
Firearms (Increased Penalties) Act 1971, ss. 4, 8
Juvenile Courts Act 1947, s. 40
G Penal Code, ss. 294, 298A, 376, 379A, 380, 411, 414

Reported by Usha Thiagarajah

H

JUDGMENT

Nallini Pathmanathan JC:

Introduction

I **[1]** In this appeal, the respondent had been charged in the Magistrate's Court with theft under s. 379A of the Penal Code ('s. 379A PC') and alternatively with dishonestly receiving or retaining stolen property, under s. 411 of the Penal Code ('s. 411

PC'). The respondent pleaded guilty to the alternative charge under s. 411, and on 28 July 2006 was convicted and released on his entering into a bond of good behaviour for a term of two years, providing a guarantee in the sum of RM2,000 with one surety and paying the costs of the prosecution in the sum of RM1,000, pursuant to s. 294 of the Criminal Procedure Code ('s. 294 CPC').

[2] The appellant appealed against the sentence imposed under s. 294 CPC. Although the petition of appeal contained several grounds, the primary issue raised by the appellant was as follows:

(i) Section 411 PC provides for a term of imprisonment of not less than six months and not more than five years or a fine, and accordingly the sentence that had been imposed by the learned Magistrate was manifestly inadequate;

(ii) The learned Magistrate had failed to give consideration to any of the factors to be taken into account as set out in s. 294 CPC in imposing a sentence under that section.

Facts Of The Case

[3] The facts of the case are straightforward. At about 1am on the morning of 20 May 2006, a team of policemen who were conducting an ambush on a house in Banting, arrested the respondent and seized a stolen motorcycle which had been stored in his kitchen. They found that the motorcycle had in fact been stored there by the respondent's son, who at that time was at large. The police further alleged that the respondent knew that the motorcycle was stolen. They then arrested and charged him for theft or alternatively for dishonestly receiving or retaining the stolen motorcycle.

[4] It is relevant to note that when first charged on 5 June 2006, the respondent pleaded not guilty and claimed trial. Bail was then set in the sum of RM4,000 in one surety, but this could not be met and the respondent was imprisoned. On 4 July 2006 bail was reduced, and the respondent met this and was released on 6 July 2006. When he appeared before the Magistrate on 28 July 2006, the respondent changed his plea to guilty in respect of the charge under s. 411. He admitted to the facts of the case and the exhibits as presented by the appellant. He had no representation during the proceedings, but pleaded with the Magistrate that he be released on a bond of good behaviour under s. 294.

Appeal

[5] At the hearing of this appeal the respondent appeared in person and made his submissions and plea upon being invited to do so by the court. He said that it was his son who had stolen the motorcycle and stored it in his house. It was after the respondent had been released on the bond under s. 294 CPC that his son was arrested and charged with the theft of the motorcycle. His son pleaded guilty and is currently serving sentence. He urged the court to take into consideration the fact that he was fifty years old, made a living by selling cakes and was not in the best of health, as he suffered from asthma.

Issues

[6] The first ground of appeal that arose for consideration was whether the sentence imposed under s. 294 CPC was manifestly inadequate in view of the statutory penalties provided for under s. 411 PC.

[7] Section 411 PC provides as follows:

> Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, **shall be punished with imprisonment for a term which may extend to five years, or with fine, or with both;** and if the stolen property is a motor vehicle or any component part of a motor vehicle as defined in section 379A, **shall be punished with imprisonment for a term of not less than six months and not more than five years, and shall also be liable to fine.** (emphasis added).

[8] In terms of punishment falling within the ambit of the section, a court may impose either imprisonment or a fine or both. But if the stolen property is a motor vehicle or component part as is the case here, then the term of imprisonment to be imposed is no less than six months and not more than five years and additionally a fine.

[9] Section 294 CPC provides:

> *When any person* not being a youthful offender *has been convicted of any offence punishable with imprisonment before any Court,* if it appears to such Court that regard being had to the *character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed* it is expedient that the offender be

released on probation of good conduct, *the Court may, instead of sentencing him at once to any punishment, direct that he be released* on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour. (emphasis added).

[10] This section envisages that where a court is by law empowered to impose the punishment of imprisonment, it may, in its discretion, provided one or more of the criteria set out in the section are met, direct that the accused be released on a bond rather than be imprisoned. Section 411 PC is such a section. It provides for imprisonment particularly in relation to motor vehicles, as is the case here, and specifically utilizes the words "shall be punished with imprisonment". If indeed a term of imprisonment is mandatory, can the court still exercise its jurisdiction under s. 294 CPC to release the respondent on a bond of good behaviour?

"Shall Be Punished"

[11] These words have been the subject-matter of consideration in numerous cases from as early as 1939. In *PP v. Man bin Ismail* [1939] 8 MLJ (FMSR) 207, Aitken J held that the expression "shall be imprisoned with imprisonment" is used where the legislature intended the sentence of imprisonment to be mandatory. In *Philip Lau Chee Heng v. PP* [1988] 1 CLJ 873; [1988] 2 CLJ (Rep) 144 where the offence was under s. 4 of the Firearms (Increased Penalties) Act 1971 and in *Gabriel v. PP* [1992] 1 MLJ 593 where the offence was under s. 380 of the Penal Code, Chong Siew Fai J, concluded that the words "shall be punished with" are mandatory in nature.

Can s. 294 CPC Be Utilized In Respect Of An Offence Involving A Motor Vehicle Under s. 411 PC?

[12] Can a good behaviour bond be imposed where the penalty prescribed by law is a mandatory sentence of imprisonment? It would appear so.

[13] In *PP v. Idris* [1955] 21 MLJ 234, Thomson J (as he then was) advised Magistrates that s. 294 CPC was only applicable in the case of offences punishable with imprisonment. This was subsequently extended to include offences which prescribed alternative punishments in *PP v. Yeong Yin Choy* [1976] 2 MLJ

267. However, it is implicit in these decisions that s. 294 CPC may be utilized whether the terms of sentence prescribed use the mandatory form "shall be punished" or otherwise.

[14] Similarly in *PP v. Lim Hong Chin* [1994] 1 CLJ 79, this issue, ie whether s. 294 CPC could be utilized where alternative forms of punishment were provided for, was considered. The offence committed was under s. 414 PC, which like s. 411 PC, provides for the alternative punishments of imprisonment or fine or both but when the stolen property is a motor-vehicle or a component part, the section prescribes that the offender "... shall be punished with imprisonment for a term of not less than six months and not more than seven years and shall also be liable to fine ..." In that case, the magistrate had released the offender on a good behaviour bond. Chong Siew Fai J followed the decision in *PP v. Yeong Yin Choy* [1976] 2 MLJ 267 and held that the provisions of s. 294 CPC are applicable where the offence prescribes alternative forms of punishment.

[15] Again it is implied in this decision that even in cases where there is a mandatory requirement for imprisonment, s. 294 CPC can still be utilized by a court in dealing with an offender. And in *Winston Rajah v. PP* [1999] 1 CLJ 315, Richard Malanjum J (as His Lordship then was) stated in the course of his judgment that he had no reason to doubt the correctness of the contention that "... the existence of a minimum, sentence does not deprive this court from exercising its discretion under s. 294 CPC".

[16] The words "punishable by imprisonment" found in s. 294 CPC indicate that it is applicable to offences that "can" be punished by imprisonment. Both a mandatory and an optional imposition of a sentence of imprisonment are instances where a court "can" punish by imprisonment. It would therefore follow that the court has a discretion to utilize the section even where the sentence prescribed is a mandatory term of imprisonment. If the circumstances of the offence are "inappropriate" for the application of s. 294 CPC, the court can decline to exercise its discretion to use the section. (See *Teh Ah Cheng v. PP* [1976] 2 MLJ 186).

[17] However a different approach was taken by Edgar Joseph Jr. J (as he then was) in *PP v. Leonard Glenn Francis* [1989] 1 CLJ 972; [1989] 2 CLJ (Rep) 320. There the accused pleaded guilty to charges of unlawful possession of firearms which was punishable

under s. 8 of the Firearms (Increased Penalties) Act 1971. That section provides that any person who is in unlawful possession of a firearm "... shall be punished with imprisonment for a term which may extend to fourteen years and with whipping with not less than six years ..." The sessions court made an order for the accused to be bound over under s. 294 CPC. Edgar Joseph Jr. J (as he then was) held that the sessions court was in error. Once the accused was convicted under s. 8 of the said Act, the learned judge held that the provisions of s. 294 CPC were overridden and the court had no option but to impose a sentence of imprisonment and whipping. The provisions of the statute being mandatory in nature, they overrode the discretion vested in the court under s. 294 CPC, thereby precluding its use. In *PP v. Mohd. Tajuddin Ahmad* [1997] 2 CLJ 913, Mohd. Noor Abdullah J (as he then was) held that in view of the peremptory language used in s. 376 PC which provides on conviction for a term of imprisonment, an imposition of a sentence under either ss. 173A or 294 CPC would be illegal.

[18] In *PP v. Kandasamy a/l Muniandy*, Dato' Zaharah Ibrahim J considered the exact issue that is before this court and came to the conclusion that the provisions of s. 294 CPC were not ousted by s. 411 PC, after examining *inter alia*, the decisions of the Supreme Court in *PP v. Mohamed Nor & Ors.* [1985] 2 MLJ 200 and *Nordin Yusmadi v. PP* [1997] 4 CLJ 25. In the former case, the High Court had dealt with the offender under s. 294 CPC in respect of an offence under s. 298A, which deals with causing disharmony, disunity or feelings of enmity, hatred or ill-will on grounds of religion. The Supreme Court, although it expressed the opinion that s. 294 CPC was inappropriate and that a term of imprisonment was more appropriate, did not interfere with the sentence imposed by the High Court. By implication therefore, the utilization of s. 294 CPC was not precluded nor stated to be illegal or overridden. Subsequent to this case, s. 298A PC was amended by the insertion of express provisions in the form of s. 298A(2), which provides that ss. 173A and 294 CPC shall not apply in respect of offences under this section. This amendment lends further weight to the applicability of s. 294 CPC in other sections of the Penal Code where similar words, ie, "shall be punished with imprisonment" are used but where there are no such express exclusions of these two sections.

[19] In *Nordin Yusmadi v. PP*, where the offender was charged under s. 376 PC, and the Sessions Court ordered that the accused be detained at the Henry Gurney school until the age of 21 years, the High Court set aside this order and substituted a sentence of five years imprisonment on the basis that the section provided for a mandatory minimum sentence of imprisonment of five years. The Court of Appeal held that in suitable circumstances an order under s. 40 of the Juvenile Courts Act 1947 could be imposed (as had been done by the Sessions Court) even if a mandatory sentence of imprisonment was provided for. In the course of its judgment the Court of Appeal impliedly approved the position that ss. 173 and 294 CPC are applicable to convictions under s. 376 when it commented:

> ... the learned senior federal counsel appearing for the respondent – *while conceding that s. 40 of the Act is applicable to convictions under s. 376 of the Code, just as the provisions of ss. 173 (sic) and 294 of the Criminal Procedure Code (FMS Cap 6)* – questions whether the facts of the present case justify the learned sessions judge to act under s. 40 of the Act. (emphasis added).

[20] In view of the decisions of the Court of Appeal and Supreme Court in the aforesaid cases, as well as the existence of express exclusionary sections in the Penal Code where ss. 173A and 294 CPC are not to be used, it would appear that notwithstanding the mandatory nature of the provisions of imprisonment provided under s. 411 PC, it is open to the Magistrate to deal with such an offender under s. 294 CPC. Therefore in the instant case, the learned Magistrate did not fall into error when dealing with the respondent under s. 294 CPC in respect of an offence under s. 411 PC.

Were The Pre-requisites Of s. 294 CPC Complied With?

[21] However the issue of whether the learned Magistrate addressed his mind to the requirements for the application of s. 294 CPC, fall to be considered. The section clearly provides that certain pre-requisites are to be met in order that a court may exercise its discretion to impose punishment under this section. There is a short, express statutory provision governing the manner in which the court should exercise its discretion judicially. In his grounds of judgment the learned Magistrate stated that he took into account the following in arriving at his decision to release the respondent on a good behaviour bond:

(a) The respondent was a first offender;

(b) He had pleaded guilty;

(c) He had a non-working wife and school going children;

(d) He had been in remand for a period of 46 days.

[22] Section 294 CPC requires that regard be had *inter alia*, to the "character, antecedents, age, health or mental condition of the offender; or the trivial nature of the offence or to any extenuating circumstances under which the offence was committed." From the record it would appear that the learned Magistrate took into account the character and antecedents of the respondent but nothing more. In short, the pre-requisites specified under s. 294 CPC do not appear to have been fully considered. It would have been preferable for other circumstances, which were available in the instant case, to have been more thoroughly examined, prior to arriving at a decision to utilize this section. The respondent's health, for example, is an issue that could have been considered.

[23] Notwithstanding this the learned Magistrate appears to have arrived at the correct decision. Therefore the appeal is dismissed.